In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, Petitioner v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents	)	**No. 08-1016**
NATIONAL MULTI HOUSING COUNCIL, *et al.*, Petitioners v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents	)	**No. 08-1017**

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION
TO EMERGENCY MOTION FOR STAY

Matthew B. Berry
General Counsel

Joseph R. Palmore
Deputy General Counsel

Richard K. Welch
Acting Deputy Associate General Counsel

C. Grey Pash
Laurence N. Bourne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

The Federal Communications Commission respectfully opposes the "emergency" motion for stay pending judicial review filed by the National Cable & Telecommunications Association ("NCTA"). NCTA asks this Court to stay in part a Commission rule intended to bring the benefits of cable competition to many of the roughly 30 percent of Americans who live in apartments, condominium buildings, and centrally managed real estate developments. The rule prohibits cable operators from executing or enforcing contractual provisions that grant them the exclusive right to provide video service to residents in such multiple dwelling units ("MDUs").[1] Such contract provisions in effect grant cable operators location-specific monopolies, shielding them from competition and denying residents the ability to choose another provider based on price and quality.

NCTA establishes none of the factors required for a stay. It has little chance of success on the merits. The relevant statute's plain text – which NCTA studiously avoids discussing – clearly authorizes the Commission to bar practices, such as exclusive contracts, that prevent consumers from accessing competing video services. Moreover, another portion of the statute – which NCTA never cites – makes clear the Commission's authority to bar enforcement of unreasonable provisions in existing contracts. NCTA also fails to show any error in the Commission's balancing of the harm in continued enforcement of these provisions against their alleged benefits.

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[1] 47 C.F.R. § 76.2000; *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007) ("*Order*"). The rule takes effect on March 7, 2008.

In addition, NCTA fails to establish that the balance of equities favors a stay. It is true that some cable operators that have enjoyed exclusive access to customers in MDUs may now have to compete for subscribers' business on the basis of price, quality, and service, but the law is clear that exposure to competition does not constitute irreparable harm. At the same time, a stay would harm other parties – residents of MDUs that would continue to be denied the benefits of competition and other companies that wish to provide it – and be contrary to the Congressionally-defined public interest in video competition.

BACKGROUND

In March 2007, the Commission initiated a renewed examination of the use of exclusive contracts for video services in MDUs.[2] Although it had concluded in an earlier proceeding that the record before it at that time did not support prohibiting such contracts,[3] the Commission noted that potential competitors had recently claimed that the use of exclusive contracts had become a barrier to entry that frustrated competition. *NPRM* ¶¶ 1, 4-5.

Following public comment, the Commission unanimously adopted the *Order* on review, concluding that contracts granting cable operators exclusive access to MDUs "harm competition and broadband deployment and that any benefits to consumers are outweighed by the harms of such clauses." *Order* ¶ 1.

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[2] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 5935 (2007) ("*NPRM*").

[3] *Telecommunications Services Inside Wiring, et al.*, 18 FCC Rcd 1342 (2003), *rev'd and remanded in part on other grounds*, *NCTA v. FCC*, 89 Fed.Appx. 743 (D.C.Cir. 2004)("*Inside Wiring Order*").

The *Order* prohibited the enforcement of existing exclusivity clauses and the execution of new ones by all video providers that are subject to 47 U.S.C. § 548 (referred to here as section 628 of the Communications Act). *Order* ¶¶ 31-32, 51.[4]

In so ruling, the Commission found that the new record developed in this proceeding was very different from the one preceding its 2003 *Inside Wiring* decision and thus required a different response. In particular, the new record demonstrated that exclusivity clauses had become "widespread in agreements between [multichannel video programming distributors ("MVPDs")] and MDU owners, and that the overwhelming majority of them grant exclusive access to incumbent cable operators." *Id.* ¶ 10; *see also id.* n.23 (discussing evidence on widespread use of exclusivity clauses, including survey showing that 90 percent of MDU residents in Raleigh and Charlotte, North Carolina were subject to them). Indeed, the record showed that "'[i]ncumbent providers commonly engage in a flurry of activity to lock up MDUs and other real estate developments in exclusive arrangements as soon as it becomes clear that a new entrant will be coming to town.'" *Id.* ¶ 14. The Commission concluded that "[e]xclusivity clauses between MVPDs and MDU owners have the clear effect of barring new entry into MDUs by wire-based MVPDs," and that "this effect occurs on a large scale." *Id.* ¶ 10.

The Commission also found that local telephone companies, such as Verizon and AT&T, and other wire-based providers were now attempting to enter the video

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[4] The rule does not apply to other video providers not subject to section 628 (such as direct broadcast satellite ("DBS")) because the "record in this proceeding does not contain much information regarding the use of exclusivity clauses by [such providers]." *Order* ¶ 2; *see also id.* ¶¶ 61-66 (NPRM on such providers).

service business on a large scale – a development that accelerated after 2003 – and that "incumbent providers (chiefly cable operators) are increasingly using exclusivity clauses in new agreements with MDU owners to bar entry of their new rivals and potential rivals." *Id.* ¶ 15. The Commission found that these "developments constitute a substantial change to the record the Commission compiled in the period leading up to the *2003 Inside Wiring Order*." *Ibid.*

In examining the record before it, the Commission concluded that the harms of exclusivity clauses "significantly outweigh the benefits in ways they did not at the time of the Commission's *2003 Inside Wiring Order*." *Order* ¶ 16. For one thing, the Commission concluded that "exclusivity clauses, especially when used in current market conditions by incumbent cable operators, are a barrier to new entry into the multichannel video marketplace and the provision of triple play offerings." *Id.* ¶ 26. "Triple play" offerings are the "bundle of video, voice and internet access service." *Id.* ¶¶ 20-21. The Commission found that exclusivity clauses, which take away competitors' ability to offer one of the bundled services, "reduce competition in the provision of triple play services[,] result in inefficient use of communications facilities," and consequently slow broadband deployment. *Id.* ¶¶ 21, 26. More generally, the Commission concluded that such clauses "deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content." *Id.* ¶ 26.

Given these findings about the market, the Commission concluded that "cable operators' use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice proscribed by Section 628(b)," frustrating that provision's purpose "to increase 'competition and diversity' in the multichannel video marketplace," and "'spur the development of communications technologies.'" *Order* ¶ 27 (quoting section 628(a)).[5] Exclusivity clauses, the Commission found, "prevent new entrant MVPDs from competing with entrenched incumbent providers on the basis of service offerings, including programming, and on price. Foreclosing competition in the MDU market in this way is unfair because it deprives consumers residing in MDUs of the opportunity to choose a MVPD provider." *Ibid.*

The Commission concluded that it had "ample authority" to prohibit exclusivity clauses. *Order* ¶ 40. It pointed to section 628(b), which states:

> It shall be unlawful for a cable operator * * * to engage in unfair methods of competition or unfair or deceptive practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. § 548(b). The Commission found that the plain language of that provision provided a "solid" substantive basis for a prohibition on exclusivity clauses. *Order* ¶ 41. Since exclusivity clauses, by their very nature, have "the effect of preventing a [rival] MVPD from providing satellite programming to consumers," the Commission found that a rule against such clauses fit comfortably

[5] Section 628 involves two types of stations that comprise large portions of cable operators' line-up: "'satellite cable programming,' which is video programming (not including satellite broadcast programming) that is transmitted by satellite to cable operators for retransmission to cable subscribers," and "'satellite broadcast programming,' which is broadcast video programming that is retransmitted by satellite by an entity other than the broadcaster or an entity under the broadcaster's control." *Order* ¶ 4 n.8.

within section 628(b)'s prohibition. *Id.* ¶ 43. Moreover, the Commission noted, section 628(c)(1) expressly commands the agency to promulgate rules specifying the conduct prohibited by section 628(b) "in order to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies * * * *" *Order* ¶ 41 (quoting 47 U.S.C. 548(c)(1)).[6]

Finally, the Commission rejected claims that it was required to grandfather existing contracts, thus putting off competition for years in MDUs already subject to long-term exclusivity provisions. *Order* ¶ 55. The Commission determined that, by expressly exempting (in section 628(h)) one narrow class of existing contracts not at issue here, Congress demonstrated its clear intent that rules issued pursuant to section 628 should have immediate effect on existing contracts. *Id.* ¶ 55 (citing 47 U.S.C. § 548(h)). Doing so in this context was especially important, given that "many exclusivity clauses date from the time when cable operators had a *de facto* or *de jure* monopoly on wire-based MVPD service." *Id.* ¶ 12.

ARGUMENT

NCTA's rhetoric about the impact of the rule prohibiting a cable operator from enforcing existing MDU exclusivity clauses obscures how narrow it is. The rule does not regulate conduct by MDU owners; they remain free (subject to

[6] The Commission also found that it had ancillary authority to prohibit exclusivity clauses under titles I and III of the Communications Act. *Order* ¶¶ 52, 74 (citing 47 U.S.C. §§ 151, 152(a), 154(i), and 303(r)).

relevant state law) to bar competitors from accessing their premises and thus to continue to provide exclusive access to the incumbent operator. If an MDU owner elects to allow competitors to provide service to residents, however, the rule would merely act to shield it from a breach of contract action by the cable operator.

Thus, the only MDUs in which cable operators may lose exclusivity are those in which the owner believes that it is in the residents' best interest to allow competitors. If a cable operator is truly providing outstanding, cost-effective service in an MDU and residents are happy with it, then many MDU owners may not bother to bring in additional providers. In all events, even if the MDU owner does permit competitors access, nothing in the rule prevents cable operators from continuing to provide service in the MDU or requires residents to switch providers. Accordingly, the only customers cable operators will lose are those that it is unable to retain through the normal operation of a competitive market in video services.

To be entitled to a stay of this narrow rule, NCTA must demonstrate that such relief is warranted on the basis of a balancing of four factors: (1) the likelihood of success on the merits; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) the likelihood of harm to others if a stay is granted; and (4) the public interest. *Washington Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843-44 (D.C. Cir. 1977). NCTA has not established entitlement to a stay under these exacting standards.

I. NCTA Has Not Demonstrated A Likelihood Of Success On The Merits

Evaluation of a stay applicant's showing on the merits is governed by the "balance of equities as revealed through examination of the other three factors." *Holiday Tours*, 559 F.2d at 844. In a case such as this, where (as discussed below) NCTA has failed to show irreparable injury, the Court may not even need to look beyond that factor. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 676 (D.C. Cir. 1985). At a minimum, however, NCTA in these circumstances must demonstrate a very substantial likelihood of success on the merits. *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985). NCTA does not come close to clearing that hurdle.

A. The Commission Has Statutory Authority To Bar Exclusivity Clauses Between Video Providers and MDU Owners

Section 628(b) makes it "unlawful" for a cable operator "to engage in unfair methods of competition or unfair * * * acts or practices * * * [that] hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b). Section 628(c)(1), in turn, provides that the Commission "shall, in order to promote the public interest, convenience, and necessity * * * prescribe regulations to specify particular conduct that is prohibited by subsection (b)." 47 U.S.C. § 548(c)(1). Because all MVPDs deliver satellite programming to their subscribers (*Order* ¶ 4) and because substantial evidence in the record demonstrated that exclusivity clauses prevent competitors from serving MDU consumers (*Order* ¶¶ 9-15, 17-23), the Commission reasonably concluded that the "plain language" of section 628 authorized the agency to prohibit cable operators from executing or enforcing exclusivity clauses with MDU owners. *Order* ¶¶ 41-43. Contrary to NCTA's assertion (Motion 6), reliance on the plain text of a statute is hardly a "novel legal argument." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (statutory interpretation begins with the statutory text, and "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete") (internal quotation omitted).

Moreover, to succeed in its statutory challenge, NCTA must demonstrate not only that the Commission's reading of the statute is not the best one, but also that it is affirmatively unreasonable. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). That is a burden that NCTA cannot overcome. NCTA never even attempts to rebut the Commission's textual analysis or explain how, in NCTA's view, exclusive contracts do not "prevent" competitors "from providing satellite cable programming . . . to . . . consumers" in MDUs. 47 U.S.C. § 548(b). Instead, NCTA argues that the Commission's textual analysis ignores (in some undefined way) the rest of Title VI of the Communications Act, and disregards the fact that section 628 allegedly "always has been understood" to deal only with "program access." Motion 6-8. Those attacks are baseless. As an initial matter, courts have repeatedly recognized that the FCC has authority to interpret and implement the provisions of Title VI. *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989). And section 628, by its express terms, both prohibits "unfair methods of competition" that "prevent" video providers from providing satellite programming to "consumers" *and* directs the

Commission to specify the conduct that falls within that prohibition. Against that precedent and the specific statutory language of section 628, NCTA's vague assertion (Motion 7) that Title VI "contains no overarching grant to the Commission of broad regulatory over the cable industry" does not remotely establish substantial likelihood of success on the merits.[7]

NCTA fares no better in arguing that section 628's legislative history shows that it was directed only to program access. *See* Motion 7-8. As an initial matter, the statute's text is not so limited, a fact that ends the inquiry. *USTA v. FBI*, 276 F.3d 620, 625 (D.C. Cir. 2002) ("we do not resort to legislative history to cloud a statutory text that is clear."). In any event, the Commission fully acknowledged and responded to NCTA's "program access" claim, finding that NCTA's reading of the legislative history was too narrow and selective. *See Order* ¶¶ 44-46. Specifically, the Commission noted that "a primary concern underlying Section 628 was fostering competition among cable operators and enhancing consumer choice." *Id.* ¶ 45 (citing H.R. Conf. Rep. 102-862 at 92 (1992); 138 Cong. Rec. H6487, H6533, H6503 (July 23, 1992) (remarks of Rep. Tauzin). And the Commission pointed out that Congress had considered and rejected language that would have implemented the narrow "program access" reading NCTA urged.[8]

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[7] NCTA erects a straw man when it suggests (Motion 7) that the Commission has broadly asserted the power to "regulate any practice at all that it deems anticompetitive." Here, the authority to prohibit a practice that indisputably has the effect of preventing MVPDs from delivering cable programming to consumers plainly flows from the text of section 628.

[8] *Order* ¶ 44 n.136 (quoting 138 Cong. Rec. H6545-01 (July 23, 1992)).

B. The FCC Has Authority To Apply The Rule To Existing Contracts

As a fallback, NCTA argues that, even if the Commission had authority to prohibit future exclusivity clauses, it lacks the power to "abrogate" existing clauses. Motion 9-11. This argument is baseless.

In the first place, NCTA has mischaracterized the Commission's rule: It does not "abrogat[e] existing exclusive contracts," as NCTA erroneously claims. The rule simply prohibits a cable operator from enforcing an exclusivity clause in an existing contract against an MDU owner (and prohibits execution of any future contract containing an exclusivity clause), on the basis of the Commission's determination that both existing and new exclusivity clauses "have the same competition- and broadband-deterring effect that harms consumers." *Order* ¶ 35. The Commission was clear, however, that a "MDU owner still retains the rights it has under relevant state law to deny a particular provider the right to provide service to its property," and that these rules do not "affect other provisions in contracts containing exclusivity clauses." *Id.* ¶ 37.

NCTA attempts to fashion a rule requiring a clear statement of statutory authority before an agency can "abrogate" existing contracts, and then claims the *Order* runs afoul of it. *See* Motion 9-10. There is no such general rule, however, as demonstrated by NCTA's resort to citation of a 100-year-old decision involving the filed tariff doctrine and a decision construing the peculiar statutory authority of the former D.C. Control Board. In any event, even if there were such a clear statement rule, it would be satisfied here. As the Commission found, section 628 itself contains a provision that explicitly contemplates that rules implementing section 628(b) will be applied to existing contracts. *Order* ¶ 55. In section 628(h), Congress provided an "exemption for prior contracts" that satisfied two criteria: (1) as to substance, the contract "grant[ed] exclusive distribution rights to any person to satellite cable programming," and (2) as to time, the contracts must have been "entered into on or before June 1, 1990." 47 U.S.C. 543(h)(1); *see Order* ¶ 55. In all other instances, Congress plainly contemplated that the Commission had authority to prohibit cable operators from enforcing any existing contracts that violate the requirements of section 628(b). If this were not the case, section 628(h) would have been unnecessary. Despite its obvious relevance to this case, NCTA makes no effort to address section 628(h).

The Commission also noted that its understanding of the import of section 628(h) was not newly minted for this proceeding. When first adopting rules to implement section 628 in 1994, the Commission stated that "'Congress intended that rules promulgated * * * to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in Section 628(h).'"[9] Thus, the statutory provision that expressly authorizes the Commission to adopt the regulations at issue here also authorizes application of those regulations to existing contracts.

A contrary result would substantially undermine the goals of section 628. It would leave the Commission with the power to declare a particular practice an

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[9] *Order* ¶ 55 (quoting *1994 Memorandum Opinion and Order*, 10 FCC Rcd 1902, 1939 (1994)); *see also Section 628 First Report & Order*, 8 FCC Rcd 3359, 3396 ¶121 (1993) (same).

"unfair method of competition," but nonetheless leave large numbers of people subject to it for long periods of time merely because the practice was memorialized in a contract. In this case, this would mean that many MDU residents would remain locked in to exclusivity clauses – some of which were executed at a time when there was no cable competition – for years, or even in perpetuity. *See Order* ¶ 10 (discussing exclusivity clauses in record that "typically last between five and 15 years, often with automatic renewal, or are perpetual"); *id.* ¶ 12.

C. The Commission's Treatment of Existing Contracts Was Reasonable

NCTA next argues that the Commission's decision to prohibit enforcement of existing exclusivity clauses was in various respects arbitrary and capricious. Motion 11-16. The Commission, however, carefully weighed the harms and benefits of such clauses in its decision and reasonably concluded on the record before it that, despite potential "short term" benefits from such clauses in "certain cases," *Order* ¶ 26, "the harms significantly outweigh[ed] the benefits in ways they did not" when the Commission previously considered the issue, *id.* ¶ 16. Such "cost-benefit analys[is] epitomize[s] the type[] of decision[] that [is] most appropriately entrusted to the [FCC's] expertise." *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006) (internal quotation omitted). NCTA's challenges to the Commission's analysis are baseless.

NCTA contends that the Commission failed to consider what it views as the "evident unfairness" to cable operators of interfering with existing exclusivity agreements. Motion 12-13. However, the only record support NCTA cites for this "unfairness" – unsubstantiated claims by Comcast and Charter generally asserting that they have invested millions of dollars in MDU wiring – provides no meaningful evidence of harm. Motion 12. Comcast's cited submission, for instance, concedes that "[i]t has not been possible for Comcast to obtain an accurate dollar amount" of its MDU investment, "nor to break it down into investment for exclusive contracts." Motion, Exhibit C ¶ 5. And although Charter argues in its filing that it could not have made its MDU investments "without assurances that, for some period of time, we would be the only video provider using the wiring we had installed," Motion, Exhibit D at 2, the *Order* does not disturb "wire exclusivity" contracts that allow "more MVPDs in a MDU or real estate development but prohibit[] them from using the existing wires * * * (which may be owned by the MVPD or the MDU owner)." *Order* ¶ 1 n.2.

Nor did the Commission ignore putative harms to cable operators. To the contrary, the Commission reasonably determined that barring enforcement of exclusivity clauses would have "minimal adverse impact on affected MVPDs." *Order* ¶ 57. In particular, "[n]othing in the rule precludes MVPDs from utilizing the wires they own to provide services to MDUs or requires them to jettison capitalized investments." *Ibid.*; *see also id.* ¶¶ 36-37. The *Order* also leaves intact "other types of agreements" between MDUs and MVPDs, including exclusive marketing and wiring agreements. *Id.* ¶¶ 1 n.2, 57. Moreover, there was nothing in the record, beyond "generalities and anecdotes," to suggest that MVPDs couple exclusivity contracts with significant investment that they do not make in other MDUs, including those "in states whose laws prohibit exclusivity." *Id.* ¶ 28.

In sum, to the extent that cable operators may sustain any harm from the prohibition against exclusivity clauses, it will arise only from exposure to potential competition. But the Commission reasonably concluded that such "harm" to incumbent providers was far outweighed by the harm exclusivity clauses visit on locked-in MDU residents and the "adverse and absolute impacts" they impose on "would-be competitors who are otherwise ready and able to provide customers the benefits of increased competition." *Order* ¶ 57; *see also id.* ¶¶ 17-23. Indeed, the Commission found that exclusivity clauses "deter new entrants from attempting to enter the market in many areas." *Id.* ¶ 19.

NCTA also alleges that the Commission's decision to prohibit exclusivity clauses constitutes an unexplained departure from its decision in the 2003 *Inside Wiring Order* to take no action against such provisions. Motion 14. But the Commission carefully explained that the different outcomes in 2003 and 2007 were justified by significant changes in market conditions as documented in a new record. *Order* ¶ 26; *see also id.* ¶ 5 n.11 ("We are mindful of the admonition of the U.S. Court of Appeals for the District of Columbia Circuit that the Commission 'must always stand ready to hear new argument and reexamine the basic propositions undergirding' its policies." (quoting *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993)). As early as 1997, the Commission had observed that "long-term exclusive contracts may raise anti-competitive concerns because they 'lock-up' properties, preventing consumers from receiving the benefits of a newly competitive market."[10] The 2003 *Inside Wiring Order* did not disavow that concern. Rather, the Commission declined to restrict exclusive contracts at that time because "the record d[id] not demonstrate that banning these contracts would significantly improve the competitive situation of multi-channel video services." *Inside Wiring Order* ¶ 4; *see also id.* ¶¶ 68-71; *Order* ¶ 5 n.10.

The record before the Commission in 2007, however, provided ample evidence of the harmful effects of exclusivity clauses and changes in market conditions, including the large-scale entry of telephone companies into the cable market. *Order* ¶¶ 12-15, 17-23. In fact, the Commission found that incumbent cable companies have accelerated use of exclusive contracts "when new competitors are on the verge of entering a particular market" in an attempt to lock up customers in advance of competition. *Id.* ¶ 27; *see id.* ¶¶ 14-15. Accordingly, the Commission found that what had been only a potential threat to competition in 2003 was now an actual "barrier to new entry into the multichannel video marketplace and the provision of triple play offerings." *Id.* ¶ 26. These new findings on a new record fully justified the Commission's decision to prohibit exclusivity clauses in 2007, and NCTA's remaining efforts to flyspeck the *Order* for alleged inconsistencies (Motion 15-16) do not render that decision unreasonable. In sum, NCTA has fallen far short of demonstrating substantial likelihood of success on the merits.

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[10] *Telecommunications Services Inside Wiring*, 13 FCC Rcd 3659 (¶ 203) (1997).

II. The Balance Of Equities Does Not Support A Stay In This Case

A. NCTA Has Failed To Demonstrate Irreparable Injury

To warrant a stay, the alleged irreparable injury "must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co.*, 758 F.2d at 674. "Bare allegations of what is likely to occur are of no value" under this part of the test, because "the court must decide whether the harm will *in fact* occur." *Ibid.* NCTA's cursory attempt (Motion 16-18) to demonstrate irreparable injury fails to establish the degree or type of injury that would warrant a stay.

First, NCTA's claim of potential lost revenues due to competition is not legally cognizable as irreparable harm. The *Order* neither prevents cable operators from serving existing subscribers (or securing new ones) nor precludes MDU owners from excluding other companies. If incumbent cable operators lose revenues as a result of the *Order*, it is only because they can no longer rely on exclusivity clauses to *foreclose* competition to which both the MDU owners and their resident consumers accede. This Court consistently has rejected the notion that exposure to competition can constitute irreparable injury. *See Central & Southern Freight Tariff Ass'n v. United States*, 757 F.2d 301, 308-09 (D.C. Cir. 1985) (petitioners had "not demonstrated the irreparable harm required for a stay, because revenues and customers lost to competition which can be regained through competition are not irreparable") (internal quotations omitted); *Holiday Tours*, 559 F.2d at 843 n.3 (the "mere existence of competition is not irreparable harm").

Indeed, the *Charlottesville Quality Cable* case on which NCTA curiously relies (Motion 18) confirms the absence of any cognizable injury here. The court in that case enjoined the operation of a cable exclusivity clause that would have precluded competition for MDU customers, while squarely rejecting the suggestion that the injunction would cause cognizable harm to the cable operator that had entered into that agreement. Because the effect of the injunction was merely to allow cable operators "to compete in an open market on equal terms," the court held that the asserted harm to the beneficiary of the exclusivity clause "does not exist." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552-53 (4th Cir. 1994).[11] The same is true here.

In any event, even if NCTA's claim of competitive loss were cognizable, it would not support a stay. Despite this Court's longstanding admonition that a party seeking a stay must "substantiate the claims that irreparable injury is 'likely' to occur," *Holiday Tours*, 559 F.2d at 843 n.3, NCTA's irreparable injury discussion is utterly lacking in specificity. NCTA baldly asserts that it is "self-evident" that cable operators will be harmed by the prohibition on enforcement of

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[11] There is no merit to NCTA's assertion (Motion 17-18) that this case "parallels" *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996), in which the Eighth Circuit stayed FCC pricing rules associated with the network element sharing requirements of the Telecommunications Act of 1996. This Court has characterized the network sharing requirements and Commission-imposed prices that were at issue in *Iowa Utilities Board* as "completely synthetic competition," *USTA v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002), and the Eighth Circuit found the potential losses to incumbent telephone companies associated with the pertinent Commission rules to be "beyond those inherent in the transition from a monopolistic market to a competitive one." *Iowa Utilities Board*, 109 F.3d at 426. Here, if incumbent cable operators lose customers and revenues, it will be the result of "compet[ition] in an open market on equal terms." *Charlottesville Quality Cable*, 22 F.3d at 552.

exclusivity clauses, but it acknowledges that "the number of buildings affected will depend on the actions of cable's competitors." Motion 16, 17.

Significantly, the Commission's prohibition on exclusivity clauses imposes no limitation on cable operators' ability to continue to provide service to existing subscribers residing in MDUs or to initiate service to new subscribers. Moreover, as previously noted, the rules do not require MDU owners to grant other companies access to their properties; rather, each "MDU owner still retains the rights it has under relevant state law to deny a particular provider the right to provide service to its property." *Order* ¶ 37. NCTA does not acknowledge these limitations on the rule's scope or make any effort to predict the extent of the competition its members will face in light of them.

Naturally, the Commission anticipates that cable operators will face additional competition in providing service to MDU subscribers in the absence of exclusivity. However, merely claiming in generalized terms that cable companies will lose revenue does not establish injury that is "both certain and great, * * * actual and not theoretical." *Wisconsin Gas Co.*, 758 F.2d at 674.[12]

B. A Stay Would Harm Other Parties And The Public Interest

In adopting the *Order*, the FCC found substantial record evidence that "exclusivity clauses cause significant harm to competition and consumers [and] deny MDU residents the benefits of increased competition, including lower prices

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[12] NCTA also claims that the rules will cause a "loss of goodwill" to cable operators. Motion 18. NCTA does not explain how the inability to enforce an exclusivity clause could possibly hurt a cable company's reputation.

and the availability of more channels with more diverse content, as well as access to alternative providers of broadband facilities and the triple play of communications services their facilities support." *Order* ¶ 26. The agency also found that exclusivity clauses hurt potential competitors because they "constitute[] an unfair method of competition or an unfair act or practice proscribed by Section 628(b)." *Id.* ¶ 27. As Proposed Intervenors show in detail in their opposition, *see* Proposed Joint Intervenors' Opp. 15-20, a stay pending review would deny cable subscribers and competitors relief from the adverse and unlawful consequences of these exclusivity clauses. It would also upend the FCC's considered judgment regarding where the public interest lies under the Communications Act. That "judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 596 (1981).[13]

CONCLUSION

The Court should deny the "emergency" motion for stay.

Respectfully submitted,

Laurence N. Bourne

Matthew B. Berry
General Counsel

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[13] The FCC's reasonable judgment regarding where the public interest lies is not impeached by NCTA's claim (at 19-20) that denying the enforceability of existing exclusivity provisions would undermine confidence in contracts. Sophisticated entities such as incumbent cable operators know their industry is subject to regulation and that legal requirements can change, and they factor that uncertainty into their investment decisions. In this case, the appropriateness of exclusivity contracts has been under "active scrutiny" since 1996, *Order* ¶ 36, and many such contracts have clauses specifically addressing the consequences of any provision therein being declared unenforceable by a regulatory authority, *id.* ¶ 37 n.112.

Joseph R. Palmore
Deputy General Counsel

Richard K. Welch
Acting Deputy Associate General Counsel

C. Grey Pash, Jr.
Laurence N. Bourne
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740

February 1, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Cable & Telecommunications Association, Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing "Opposition Of Federal Communications Commission To Emergency Motion For Stay" was served this 1st day of February, 2008, by mailing true copies thereof, postage prepaid, to the following persons, at the addresses listed below:

Matthew C. Ames
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W.
Suite 1000
Washington DC 20036-4306

Counsel For: National Multi Housing Council, et al.

Daniel L. Brenner
National Cable & Telecommunications Association
25 Massachusetts Ave., N.W.
Suite 100
Washington DC 20001-1431

Counsel For: National Cable & Telecommunications Association

Harry F. Cole
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street
11th Floor
Arlington VA 22209

Counsel For: SureWest Communications

Nancy C. Garrison
U.S. Dept. of Justice
Antitrust Div., Appellate Section
950 Pennsylvania Avenue, N.W., Room 3224
Washington DC 20530-0001

Counsel For: USA

Michael E. Glover
Verizon
1515 North Courthouse Road
Suite 500
Arlington VA 22201-2909

Counsel For: Verizon

Andrew G. McBride
Wiley Rein LLP
1776 K Street, N.W.
11th Floor
Washington DC 20006-2359

Counsel For: AT&T Inc., et al.

Gary Liman Phillips
AT&T Inc.
1401 I Street, N.W.
4th Floor
Washington DC 20005

Counsel For: AT&T Inc.

* Paul M. Smith
Jenner & Block, LLP
601 13th Street, N.W.
Suite 1200 South
Washington DC 20005-3823

Counsel For: National Cable & Telecommunications Association

* Hand deliver by messanger

Sharon D. Freeman
Sharon D. Freeman